2007

Superior Recovery Service, Inc. v. James E. Pett : Petition for Rehearing

Utah Court of Appeals

Jonathan P. Thomas; Chris Daines; Attorneys for Superior Receivables Services.
Charles A. Schultz; Attorney for James E. Pett.

IN THE UTAH COURT OF APPEALS

SUPERIOR RECOVERY SERVICE, INC., Plaintiff, vs. JAMES E. PETT, Defendant.	Court of Appeals Case No. 20070095-CA District Court Case No. 060100241 DC

PETITION FOR REHEARING

This is a Petition for Rehearing of the court's memorandum decision entered in this matter on June 12, 2008.

Jonathan P. Thomas
31 Federal Avenue
Logan, Utah 84321
Phone: (435) 792-4500

Chris Daines
135 North Main, Suite 108
Logan, Utah 84321
Phone: (435)752-1750
Attorneys for Superior Receivables Services

Charles A. Schultz
222 West 700 South
Brigham City, Utah 84302
Phone: 435.225.2636
Attorney for James E. Pett

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APPELLATE STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Citing Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 20, 70 P.3d 1, the Utah Supreme Court in 2008 UTSC 20060986 - 020508, Bowman v. Kalm declared:

> ¶ 6 *When reviewing a grant of summary judgment, we view the facts in the light most favorable to the non-moving party." Utah Golf Ass'n v. City of N. Salt Lake, 2003 UT 38, ¶ 10, 79 P.3d 919 (citation omitted). "We grant no deference to the district court's conclusions of law and review them for correctness."*

However, in rendering its decision in this matter, this court completely ignored its obligation under Grynberg v. Questar Pipeline Co. and Bowman v. Kalm, as well as other clear and controlling Utah law, specifying an appellate court's duty in reviewing an appeal of a grant of summary judgment, and viewed all disputed facts in the light most favorable to Superior, drew all inferences, whether reasonable or not, in a light most favorable to Superior and made prohibited factual findings of its own.

ARGUMENT

THIS COURT VIEWED THE FACTS OF THIS CASE IN A LIGHT MOST FAVORABLE TO SUPERIOR, WHEN IT AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT. THIS COURT ALSO MADE FACTUAL FINDINGS ON APPEAL AND PROJECTED FINDINGS AND CONCLUSIONS INTO THE TRIAL COURT'S DECISIONS, WHICH THE TRIAL COURT DID NOT MAKE, AND THEN, THIS COURT AFFIRMED THOSE NONE EXISTENT FINDINGS AND CONCLUSIONS OF THE TRIAL COURT.

A. THE DIFFERENT AMOUNTS SPECIFIED IN SUPERIOR'S COMPLAINT, AND ITS SUPPORTING DOCUMENTS, CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO HOW MUCH, IF ANY MR. PETT MAY OWE.

This court is not only wrong in its improper factual conclusion, contained in ¶ 3 of its memorandum decision, that different amounts specified in Superior's complaint and supporting documents do not create a genuine issue of material fact as to how much, if

any, Mr. Pett owes Interwest, the court's math used making that improper factual conclusion, is simply wrong, and this court is not entitled to make factual conclusions on appeal.[1]

This court incorrectly and improperly makes the factual conclusion that the difference between the $572.00 Superior asked for in its complaint and the $627.00 it was awarded on summary judgment is due to finance charges on the $572.00. However, if the entries for finance charges on Mr. Pett's *"Patient Ledger Analysis," (hereinafter, "the Ledger")* are totaled, the amount is $63.12, not the $55.00 the court incorrectly and improperly concludes is interest on the $572.00. This court's improper factual conclusion that the difference between the amount specified in Superior's complaint of $627.00 and the $572.00, it claims it is owed, in Gittins affidavit, is due to interest on the principal charge of $572.00, is simply wrong and so is this court's math.

Under the facts of this case, and given the limited amount of evidence Superior has provided, it is impossible to determine how much, if any, Mr. Pett owes Interwest, and Interwest's own documents undeniably create a genuine issue of material fact as to how much, if any, Mr. Pett owes Interwest. Therefore, this court was wrong in making its improper and incorrect factual conclusion that:

> *the different amounts did not create a genuine issue of fact because they merely reflected the account balance at different points in time and did not affect the total amount due at the time of judgment.*

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1. The trial court could not, and did not, make the factual finding that the difference between the amount prayed for in Superior's complaint and the amount Interwest claimed Mr. Pett owed in its supporting documents was due to accumulated interest, and this court can not do so on appeal. (Record at 73, 94, 102-106).

If, however, this court is going to make factual conclusions, at the very least it should explain how it reached its factual conclusions. This court should explain how it concluded that $55.00 is equivalent to $63.12 and how it computed the alleged finance charges to arrive at its $55.00 figure.[2]

This court should not just make factual conclusions without explaining how it allegedly arrived at those factual conclusions, even if it were permitted to make factual conclusions, which it is not. This court can only review the trial court's grant of summary judgment for correctness. It cannot make independent factual findings, that are not contained in the trial court's decision. The trial court never concluded that the difference between the $572.00 Superior asked for in its complaint and the $627.00 it was awarded on summary judgment was due to interest charges on the $572.00. Therefore, as a matter of law, this court cannot make the factual finding that the difference between the $572.00 Superior asked for in its complaint and the $627.00 it was awarded on summary judgment was due to interest charges on the $572.00, or hold that such a conclusion, the trial court never made, is correct.

B. THE COURT WAS WRONG IN MAKING THE FACTUAL CONCLUSION THAT GITTINS AFFIDAVIT WAS BASED ON PERSONAL KNOWLEDGE.

In ¶ 10 of its memorandum decision, this court states:

> *In her affidavit, Gittins identifies herself as the office manager and* ***the*** *custodian of records for the service provider.* (Emphasis added).

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2. It appears that in order to justify its improper conclusion that $55.00 difference is due to finance charges on the $572.00, the court only included the finance charges on page one of the *Ledger* and chose to ignore the finance charges on page two of the *Ledger.*

However, in her affidavit, Gittins states:

> *I am the officer manager of Interwest Anesthesia, a client of Superior Recovevery Inc. ("Superior"), which means I have access to all account information regarding James Pett's (the "Defendant") account, and I am* ***a*** *custodian of the records."* (Emphasis added).

Gittins goes on to say:

> *The records of the Defendant's account that I reviewed are kept in the course of a regularly conducted business procedure, and it our regular practice to make memorandums, reports, records or data compilations.* (Emphasis added).

However, Gittins does not state that she created any of the entries in Mr. Pett's *Ledger* or that she was even present at the time any of the entries contained in Mr. Pett's *Ledger* were allegedly made. Gittins does not state that the entries on the *Ledger* were made on or near the time the events on the *Ledger* allegedly occurred. Furthermore, Gittins does not specify during what time period she has been *"the officer manager for Interwest,"* what period of time she has been *" **a** custodian of the records,"* or if she was even employed at Interwest when the entries to Mr. Pett's *Ledger* were made.

Additionally, Gittins' affidavit does not specify which statements in her affidavit were allegedly made from personal knowledge or memory and which statements were based on her review of Mr. Pett's *Ledger."* Therefore, Gittins has not established that she is competent to testify from personal knowledge or memory concerning any of the entries contained in Mr. Pett's *Ledger,* and this court was wrong in making a factual finding to wit:

> *Gittins statements provided in her affidavit are therefore, made on "personal knowledge" and set forth facts as would be admissible in evidence" in accordance with rule 56(e)."*

This court is not permitted to make factual findings on an appeal from a grant of summary judgment.[3] This court is only permitted, after considering all evidence in a light most favorable to the losing party, and to drawing all reasonable inferences from that evidence in the light most favorable to the losing party, i.e., Mr. Pett, to determine if the district court was correct in finding that there were no genuine issues of material fact present in this case and if, as a matter of law, Superior was entitled to summary judgment. This court did not do that.

C. THE COURT WAS WRONG IN CONCLUDING THAT MR. PETT'S *LEDGER* IS A BUSINESS RECORD.

This court was also wrong making the factual finding to wit:

> *Further, to the extent that Gittins's affidavit relies on the service provider's records, those records constitute business records and are not inadmissible hearsay under the circumstances.*

Under the facts of this case, it is factually and legally impossible to conclude that Mr. Pett's *Ledger* is a business record, that is exempt from the hearsay provisions of Rule 801 URE.

> *For evidence to be admissible as a business record, a proper foundation must be laid to establish the necessary indicia of reliability. That foundation should generally include the following: (1) the record must be made in the regular course*

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3. The trial court did not make any factual finding that Gittins' affidavit was *"made on "personal knowledge" and set forth facts as would be admissible in evidence" in accordance with rule 56(e),"* And the trial court did not conclude that there was no dispute as to whether or not Gittins' affidavit was *"made on "personal knowledge" and set forth facts as would be admissible in evidence."* Therefore, as a matter of law, this court could not review that conclusion for correctness. Ergo, this court's conclusion that Gittin's affidavit was *"made on "personal knowledge" and set forth facts as would be admissible in evidence" in accordance with rule 56(e),"* is an improper factual finding this court has made and not a review of the trial court's decision.

> *of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness.* (Emphasis added).

State v. Bertul, 664 P.2d 1181 (Utah 1983).

Not only is it indisputable that many of the entries on Mr. Pett's *Ledger* were not made *"in close proximity to, the occurrence of the act, condition or event recorded,"* the circumstances of the *Ledger's* preparation indicate a complete lack of trustworthiness.[4] The entries on the *Ledger* are not in chronological order. Therefore, as a matter of fact, the entries could not have been *"made at or near the time"* of the *"Ledger's"* creation as required by Rule 803(6) URE.[5]

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4. The *Ledger* is at best a summary, referencing other documents that are not documents Interwest would keep as a part of Mr. Pett's account, and the *Ledger* was prepared strictly for this case, as the name *"Patient Ledger Analysis"* indicates. The entry dated 7/27/2005 stating: *"ALTIUS PAID YOU $514,80 ON 1/25/05. PAYMENT IN FULL IS DUE IMMEDIATELY. ALTIUS IS RETRACTING THE PAYMENT MADE TO US. PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS. THANK YOUR!"* is not an entry any business would make in the payment history of an account, and it is based on inadmissible hearsay. Whoever, made that entry has no personal knowledge as to whether or not Altius ever paid Mr. Pett any amount, on 2/25/2005 or any other date, and if the person who made that entry relied on some other document or oral conversation in making the 7/27/2005 entry, both the document and the conversation are hearsay, and the 7/27/2005 entry is hearsay also. THerefore, Gittins could not rely on it in making her affidavit, which she admits she did in her affidavit.

5. In pertinent part, Rule 803(6) provides:
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, ***made at or near the time*** *by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, ...* ***unless the***

The entries on page 1 of the *Ledger* are chronological order, from 5/27/2004 through 9/1/2005. However, on page 2 of the *Ledger,"* the entries change to 6/10/2004, 7/12/2004, 9/1/2004, 10/1/2004, and the final entry is 11/2005. It is, therefore, indisputable that the *Ledger"*was *"made at or near the time*" of those entries.

No logical person can possibly conclude that the entries of 6/10/2004, 7/12/2004, 9/1/2004, and 10/1/2004, made on the *Ledger* after the entry of 9/1/2005, were *"made at or near the time*" the events of 6/10/2004, 7/12/2004, 9/1/2004, and 10/1/2004 allegedly occurred. Therefore, as a matter of law, the *Ledger* cannot be construed to be a business record under the provisions of Rule 803(6) URE, and the *Ledger* is inadmissible hearsay, as a matter of law.

Because the circumstances of the *Ledger's* creation *"indicate lack of trustworthiness,"*the *Ledger* cannot be construed as a business record under Rule 803(6) URE, and this court was clearly wrong in concluding the *Ledger* is a business record. Furthermore, because the *Ledger* is not a business record, Gittins could not rely on it in making her affidavit.

D. THIS COURT WAS WRONG IN MAKING ITS FACTUAL CONCLUSION THAT THE TRIAL COURT FOUND IT WAS UNDISPUTED THAT $318 WAS ADDED TO MR. PETT'S ACCOUNT AS COLLECTION COSTS.

In ¶ 4 of its decision, the court also makes the following improper and incorrect finding of fact:

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source of information or the method or circumstances of preparation indicate lack of trustworthiness. (Emphasis added).

However, as the district court correctly noted in its order granting summary judgment, there was no dispute that the $318 was attributable to collection costs incurred and was added to Pett's account balance when the service provider referred the account to Superior for collection on November 1, 2005.

Not only is that factual finding improper, it is incorrect.[6] There was a vigorous dispute as to the purpose of the $317.57 entry on Mr. Pett's *Ledger*, and Superior's own documents create a dispute as to what the $317.57 entry on the *Ledger* represents.

The *Ledger* starts with a *"**Charge Balance**" of* $635.14, on May 27, 2004, and it ends with a *"**Charge Balance**"* of $317.57 on November 1, 2005. Superior cannot possibly logically and honestly claim that it added a collection charge of $635.14, on May 27, 2004, to Mr. Pett's account *"to make sure that Interwest Anaesthesia is made whole."* However, in her affidavit Gittins falsely claims that the *"**Charge Balance**"* of $317.57 was added to Mr. Pett's *Ledger* on November 1, 2005 *"to make sure that Interwest Anaesthesia is made whole."*

Interwest had already added a *"**Charge Balance**"* of $635.14 to Mr. Pett's account on May 27, 2004. Why would it need to add another *"**Charge Balance**"* of $317.57 to

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6. Nowhere in either its first or second memorandum decision or in the Findings, Order and Judgment does the trial court state, suggest or even imply that *"there was no dispute that the $318 was attributable to collection costs incurred and was added to Pett's account balance when the service provider referred the account to Superior for collection on November 1, 2005."* (Record 94-95). This court is inserting its improper and incorrect factual conclusions into the trial court's first memorandum decision, the second memorandum decision or in the Findings, Order and Judgment, when no such conclusions, by the trial court, are contained in those documents. Again, this court is not entitled to make factual findings on appeal. Nor is this court entitled to insert its own erroneous conclusions into the trial court's documents, after the fact. This court is only entitled to review the correctness of the trial court's grant of summary judgment. This court cannot insert conclusions in the trial court's documents that were never made by the trial court and then say that those conclusions, that were never made, are correct.

Mr. Pett's account on November 1, 2005, in order *"to make sure that Interwest Anaesthesia is made whole?"*

If the *"**Charge Balance**"* of $317.57, to Mr. Pett's account on November 1, 2005, was made in order *"to make sure that Interwest Anaesthesia is made whole,"* as Superior and Gittins claim, then the *"**Charge Balance**"* of $635.14, made to Mr. Pett's account on May 27, 2004, must also be an amount added to Mr. Pett's account in order *"to make sure that Interwest Anaesthesia is made whole."* They are the exact same entry. Just the dates and amounts are different. If one is a charge added to Mr. Pett's account, *"to make sure that Interwest Anaesthesia is made whole,"* then the other must be also. However, given the fact that Interwest had already added the *"**Charge Balance**"* of $635.14 to Mr. Pett's account, in order to make Interwest whole, why did Interwest not transfer the *"**Charge Balance**"* of $635.14 to Superior for collection? Why did Interwest transfer a lower amount of $317.57 to Mr. Pett's account on November 1, 2005, why not $635.14?

The truth is that the $317.57 ending balance on Mr. Pett's *Ledger* is the amount of his alleged bill, represented on his *Ledger,* that Interwest assigned to Superior for collection, not any additional collection charge added to Mr. Pett's account *"to make sure that Interwest Anaesthesia is made whole."* The assertion that Interwest added $317.57 to Mr. Pett's account *"to make sure that Interwest Anaesthesia is made whole,"* is illogical at best. No reasonable person or entity would arbitrarily choose $317.57 as an amount to add as collection costs to an account.

However, even assuming, arguendo, that Interwest had some logical reason for choosing the amount of $317.57, the fact that it used identical entry for the alleged

addition for collection costs on November 1, 2005 as it used when it made the first entry on Mr. Pett's *Ledger,* undeniably creates an issue of fact as to what the "***Charge Balance***" of $317.57 to Mr. Pett's account on November 1, 2005 really was. Therefore, this court could not make the improper factual conclusion that *"there was no dispute that the $318 was attributable to collection costs,"* especially when the trial court made no such finding, contrary to this court's assertion.

E. THE COURT IS WRONG IN ITS ASSERTION THAT THE AMOUNT MR. PETT ALLEGEDLY OWES INTERWEST IS A PERIPHERAL ISSUE.

In ¶ 6 of its memorandum decision, the court states that *"principal amount owed"* is a *"peripheral issue."* That statement is unbelievable and incomprehensible, to say the least. If the amount a defendant allegedly owes a plaintiff is a peripheral issue, what is a core issue?

Is this court really stating that it does not matter how much a defendant allegedly owes a plaintiff, so long as the defendant owes the plaintiff something, and if there is a dispute as to how much is owed, the amount owed is irrelevant, just so long as some amount is owed? Is the court saying a plaintiff does not have the burden of proving how much it is owed but can just claim any amount and the defendant has to prove the amount claimed by the plaintiff is incorrect?

If there is an issue to the amount of a debt that is owed, even if it is admitted that the debt is owed, a court is not entitled to just say, well it doesn't make any difference how much is owed, just so long as something is owed and then award whatever amount is asked for by a plaintiff, as the trial court did in this case and as this court has done on

appeal.

F. THIS COURT WAS WRONG IN CONCLUDING THAT SUPERIOR AND/OR INTERWEST PROVED THAT ALTIUS *"RETRACTED"* ANY PAYMENT TO INTERWEST.

In its memorandum decision this court states:

> *Superior provided affidavit evidence that Pett's insurer "retracted" a payment on Pett's account because of a direct payment by the insurer to Pett, thereby leaving him with a greater balance Pett's affidavit counters that he never received a direct payment from his insurer. While Pett's affidavit may raise an inference that the insurer's retraction of payment on his account was improper or that Pett may be owed money by his insurer, it does nothing to counter Superior's factual assertion that the payment was, in fact retracted.* (Emphasis added).

That assertion is simply mind-boggling. The court is requiring Mr. Pett to prove a negative, i.e., that Altius never "retracted" the payment to Interwest, something Mr. Pett can never do.[7] One cannot prove a negative.

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7. Because, both Interwest and Superior claimed Altius only "retracted" the payment to Interwest because Altius paid Mr. Pett directly for the services and supplies provided on his behalf, and because Mr. Pett disputed that Altius paid him any amount for the services, provided by Interewest, the burden of proof then shifted back to Superior and Interwest to prove in fact that Altius had "retracted" the payment, both Interwest and Superior admit Altius made to Interwest. If, in fact, Altius "retracted" the payment to Interwest, both Superior and Interwest could have proven that Altius did so, but neither Superior or Interwest did so, or even attempted to do so. (Record at 57-66).

In fact, rather than attempting to provide any evidence that Altius "retracted" the payment to Interwest, Superior changed its story to contradict Gittin's affidavit and claimed that Altius had not "retracted" the payment, but rather claimed: *"that a refund check was sent to Altius on or about July 31, 2005,* because as Superior claimed: *"Is it that unusual of a concept that* if Interwest *did not send a refund check to Altius that Altius would off-set the amount on another account."* (Record at 62).

Superior then goes on to admit: *"The Plaintiff is unable to fully respond to the argument that "There is no evidence that Mr. Pett's insurance carrier ever withdrew payment the plaintiff admits it made to Interwest.* Superior has thus admitted that it cannot meet its burden of proof to provide evidence that Altius ever "retracted" the

Superior, as the plaintiff in this case had the burden of proof on each element of its case. Mr. Pett did not have the burden to disprove Superior's claims.[8]

If this court is going to make a factual finding that Altius "retracted" the payment, both Interwest and Superior admit Altius made, more than a year after Superior and Interwest admit that Altius made the payment, this court has to explain the basis of that factual finding. The mere fact that someone claims something happened does not make the claim true, even if the claim is made in an affidavit. When a claim is factual and legally illogical, if not outright impossible, a mere assertion of the claim does not make the claim true, even if the claim is made in an affidavit.

Unless this court, the trial court, Superior, or Interwest can explain how Altius actually and legally was able to "retract" a payment Altius made to Interwest 348 days earlier, neither this court nor the trial court can make a factual conclusion that Altius "retracted" the payment, especially when the only alleged evidence of the alleged "retraction" is Gittins' affidavit based on the *Ledger*, that is inadmissible hearsay and

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payment Altius made to Interwest. (Record at 62).

8. *"Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law. In order to meet his initial burden on summary judgment."* 2008 UTSC 20061094 - 011508; Orvis v. Johnson. In this matter, Superior had the burden to prove that the payment from Altius to Interwest had been "retracted," not to just allege it had been "retracted". Gittins' assertion that Altius' payment to Interwest had been "retracted" is not proof, especially when that assertion is based on the claim that Altius only "retracted" the payment because Altius made a payment Mr. Pett and when Mr. Pett stated under oath that he never received any payment from Altius. Gittin's unsupported claim that Altius "retracted" the payment to Altius does not meet Superior's burden of proof to establish that Altius did in fact "retract" the payment to Interwest, when as practical and legal matter it would be virtually impossible for Altius to "retract" the payment to Interwest 384 days after the payment was made.

based on a summary document, that was created just for purposes of this litigation.

Furthermore, Superior, Interwest and this court all state that the payment was allegedly "retracted" **because** Altius allegedly paid Mr. Pett the sum of $514.80 on February 2, 2005. The only reason Interwest and Superior claim that Altius allegedly made the retraction of the payment is that Altius allegedly paid Mr. Pett the sum of $514.80 on February 2, 2005.

However, if Altius never paid Mr. Pett $514.80 on February 2, 2005, as Mr. Pett has stated in his affidavit, there was no logical reason why Altius would retract any payment to Interwest. The mere fact that Superior, Interwest and this court all state that Altius allegedly "retracted" the payment to Interwest only because Altius allegedly paid Mr. Pett $514.80 on February 2, 2005 and Mr. Pett states, under oath, that he never received any direct payment from Altius, creates a genuine issue of fact as to whether or not Altius ever "retracted" any payment to Interwest, and that issue of fact precluded the trial court from entering summary judgment and it precluded this court from affirming the trial court's grant of summary judgment.

Both this court and the trial court were precluded from making a factual finding that Altius "retracted" its payment to Interwest based on Superior's own memoranda. In its initial memoranda, Superior's counsel stated that:

> *However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004.* (Emphasis added).

However, Interwest, Superior and this court cannot explain how Altius could "retract" a

payment it made to Interwest 384 days earlier, and Superior even admits that: *"The Plaintiff is unable to fully respond to the argument that "There is no evidence that Mr. Pett's insurance carrier ever withdrew payment the plaintiff admits it made to Interwest.* (Footnote 8). And, the trial court also admits in its second memorandum decision that neither Interwest nor Superior can explain how Altius was able to "retract" the previous payment it made to Interwest on Mr. Pett's behalf. (Record 102-103).

If this court is going to make the improper and incorrect factual conclusion that:

> *Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004.*

This court must explain how it was legally and factually possible for Altius to "retract" the previous payment it made to Interwest on Mr. Pett's behalf, some 384 days earlier. If this court cannot do that, and it cannot, it cannot justify its improper and unsupported conclusion that:

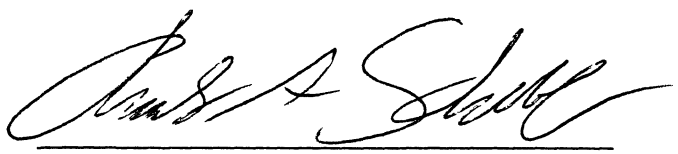
> *Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004.*

CONCLUSION AND REQUEST FOR RELIEF

This court failed to adhere to the proper standard for review of a summary judgment motion when issuing its memorandum decision. This court improperly viewed all facts of this case in the light most favorable to Superior. This court also drew all inferences from the facts in favor of Superior. This court also made factual findings of its own and imputed factual findings into the trial court's memorandum and order and then

sustained those findings and conclusions, when the trial court made no such factual findings or conclusions. This court is required to view all facts in the light most favorable to Mr. Pett and to draw all inferences from those facts in favor of Mr. Pett. This court is also specifically prohibited from making factual findings or rewriting the memoranda and orders of the trial court. Therefore, Mr. Pett is entitled to have this court re-examine its memorandum decision and issue a proper decision in conformity with the appropriate standard of review for a grant of summary judgment before an appeal court.[9]

Dated this 30th day of June 2008.



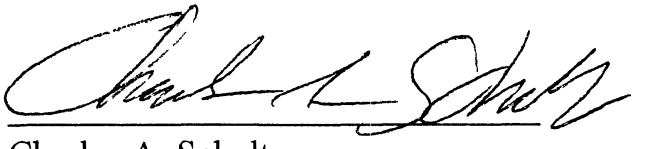
Charles A. Schultz
Attorney for James E. Pett

10. This court is correct in its assertions that there is no dispute Interwest provided medical services and/or supplies, on behalf of Mr. Pett. And the court may even be correct that Mr. Pett may still owe Interwest some amount for those medical services and/or supplies. However, there is genuine issue of fact as to how much, if any, he may owe Interwest, and that genuine issue of fact precluded the trial court from entering summary judgment against him, and it precludes this court from affirming the trial court's grant of summary judgment against him.

CERTIFICATE OF GOOD FAITH FILING

Pursuant to the provisions of Rule 35 URAP, the undersigned Charles A. Schultz hereby certifies that he is filing this Petition for a Rehearing in good faith, for the purpose of protecting Mr. Pett's rights and in an attempt to explain to the court how and why Mr. Pett believes the court erred, in both factual and legal ways, in issuing its memorandum decision in this matter. Mr. Schultz further certifies that this Petition is not being filed for the purpose of delay.

Dated this 30th day of June 2008.



Charles A. Schultz
Attorney for James E. Pett

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of June 2008, I served two true and correct copes of the Petition for Re-Hearing to the person(s) at the address(es) below, by depositing a copy(s) in the United States mail, postage prepaid, addressed as follows:

Jonathan P. Thomas
31 Federal Ave.
Logan, UT 84321

Charles A. Schultz
Attorney for James E. Pett